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Decision

1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 BROIDY CAPITAL MANAGEMENT,
4 LLC, et al.,

5 Plaintiffs,

6 v.

18 Civ. 6615 CS

7 JAMAL BENOMAR,

8 Defendant.

9 -----x

United States Courthouse
White Plains, N.Y.
December 21, 2018
10:00 a.m.

11 Before:

12 THE HONORABLE CATHY SEIBEL,

13 District Judge

14 APPEARANCES

15 BOIES SCHILLER & FLEXNER, LLP

16 Attorneys for Plaintiff Broidy Capital Mgmt., et al.

17 SAM KLEINER,

18 ROBERT JEFFREY DWYER

-and-

LEE SCOTT WOLOSKY

19 WINSTON & STRAWN, LLP

Attorneys for Defendant Jamal Benomar

20 ABBE DAVID LOWELL

-and-

21 ERIC WESTON BLOOM

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1 (In open court)

2 THE DEPUTY CLERK: In the matter of Broidy v. Benomar.

3 THE COURT: Have a seat. Let me make sure I know who
4 is who.

5 Mr. Wolosky.

6 MR. WOLOSKY: Good morning, your Honor.

7 THE COURT: Mr. Kleiner --

8 MR. KLEINER: Good morning, your Honor.

9 THE COURT: And Mr. Dwyer.

10 MR. DWYER: Good morning, your Honor.

11 THE COURT: Good morning.

12 And Mr. Lowell.

13 MR. LOWELL: Yes, ma'am.

14 THE COURT: And Mr. Bloom.

15 MR. BLOOM: Good morning, your Honor.

16 THE COURT: Ordinarily, I invite the lawyers to tell
17 me if there's anything they want to add that's not covered by
18 the papers. I'm a little nervous about doing that because, in
19 this case, sometimes I think the lawyers tell me things because
20 they would like to see them quoted back later in the paper or
21 because they want to make me think the other side or the other
22 side's lawyer is a good guy or bad guy. I'm really not
23 interested in that.

24 I don't care if Mr. Benomar did great things when he
25 was with the UN or if he did terrible things since, and I don't

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1 care if Mr. Broidy is doing great things for the government or
2 is under investigation by the government. I don't want to hear
3 any of that.

4 But if there's something related to the motion that
5 you didn't have the opportunity to cover in the papers, I'll
6 give you the opportunity to say a few words, but don't feel
7 obligated. It's your motion, Mr. Lowell.

8 Is there anything not covered by the papers that you
9 think is important?

10 MR. LOWELL: I don't think so, your Honor. I think
11 you gave us the chance to fully brief the legal issues that
12 apply, and I feel like we have given you all that we need to
13 ask for the relief that we ask.

14 THE COURT: Mr. Wolosky, any last words?

15 MR. WOLOSKY: No, your Honor. Obviously, we had
16 sought leave to amend our complaint to account for the
17 case-changing development that occurred in the middle -- two
18 months after we filed our complaint, as evidenced by the
19 submission made to the Court of a blue card on November 21st.
20 Obviously, our amended complaint would seek to add the
21 jurisdictional allegations that are now relevant to the status
22 that's been confirmed relating to the defendant by the State
23 Department.

24 THE COURT: Well, I'll get to that.

25 MR. WOLOSKY: Thank you, your Honor.

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1 THE COURT: Let me tell you where I come out.

2 First of all, it's the defendant's motion to dismiss
3 under Rule 12(b)(1) on grounds of diplomatic immunity and
4 derivative sovereign immunity. I take the factual background
5 from the complaint and the various exhibits, declarations and
6 affidavits provided in connection with the motion.

7 And by the way, to the extent the plaintiffs objected
8 to Mr. Lowell's declarations' failure to properly authenticate
9 the exhibits attached to it, and that declaration was Document
10 40, an objection that, in large part, was well taken, that
11 objection has largely been mooted by the defendant's
12 supplemental declaration, which is Document 49, which I think
13 does properly authenticate the exhibits attached to it.

14 The plaintiff, Broidy Capital Management, LLC, is an
15 investment firm. The plaintiff, Elliott Broidy, is the C.E.O.
16 and Chairman of Broidy Capital Management. He is the former
17 Deputy Finance Chair of the Republican National Committee.

18 The defendant, Jamal Benomar, was born in Morocco, is
19 a citizen of the United Kingdom and resides in this district.
20 In 1993, he joined the United Nations. During his career at
21 the UN, he held various positions in New York, Geneva, and
22 other locations. Over the course of his career, he's resided
23 in the U.S. for significant periods.

24 On July 1, 2017, he left the UN after 24 years. At an
25 unstated time thereafter, he was asked to advise the Kingdom of

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1 Morocco by becoming an official in the Kingdom's Permanent
2 Mission to the UN. And this is coming largely from his
3 declaration. He asserts that since November 1 of last year, he
4 has served as a diplomat with the highest diplomatic rank of
5 Minister Plenipotentiary at the Permanent Mission as accredited
6 by the Ministry of Foreign Affairs and International
7 Cooperation of the Kingdom of Morocco.

8 In recognition of his diplomatic status, on November 1
9 of last year, the U.S. granted him a G-1 diplomatic visa, which
10 is attached to his supplemental declaration as Exhibit 1. That
11 visa remains operative and doesn't expire until October 2022.

12 For the last 12 months, the defendant has acted as a
13 Moroccan diplomat for Morocco's Permanent Mission to the UN,
14 traveling on his diplomatic passport, and returning to the U.S.
15 on his diplomatic visa; although, he states in his declaration
16 that he has not left the country since September 15, 2018, or
17 at least that was so as of the date of his declaration.

18 The plaintiffs in this action were also plaintiffs in
19 an action commenced on March 26, 2018, in the U.S. District
20 Court for the Central District of California, captioned Broidy
21 Capital Management, LLC, et al. v. State of Qatar. And that
22 was Case No. 18 CV 2421. I'm going to call that the California
23 action.

24 The defendants in the California action were the State
25 of Qatar - I'm probably mispronouncing that - Stonington

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1 Strategies, LLC, Nicolas D. Muzin, Global Risk Advisors, LLC,
2 Kevin Chalker, David Mark Powell, Mohammed Bin Hamad Bin
3 Khalifa Al Thani, Ahmed Al-Ruhmaihi, and certain Doe
4 defendants.

5 The California action alleges a conspiracy by which
6 Qatar, acting through various agents, directed and orchestrated
7 a sophisticated criminal hack of computer systems belonging to
8 plaintiffs.

9 The conspiracy further extended to the review,
10 analysis, categorization, and distribution of hundreds of
11 thousands of stolen documents to various media outlets for the
12 purpose of harming plaintiff Broidy.

13 Plaintiff's full description of that conspiracy is
14 contained in the May 24, 2018 first amended complaint filed in
15 the California action, which is attached to the complaint in
16 this case.

17 Benomar is referred to in Paragraph 7 of the first
18 amended complaint in the California action as a, quote,
19 "retired Moroccan diplomat," unquote, who, upon information and
20 belief, was used by Qatar to attack the plaintiffs.

21 After plaintiffs filed the lawsuit in the California
22 action, Benomar says he and his family became the subject of
23 harassment, which harassment intensified after the filing of
24 this action. Following these incidents, Benomar consulted with
25 colleagues in, quote, "the government," unquote, although he

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1 doesn't specify which government he is talking about. That's
2 in Paragraph 39 of his declaration.

3 He sought U.S. identification credentials to see if
4 that could help avoid, stop, or respond to these acts of
5 harassment. To that end, on August 1, 2018, the Permanent
6 Mission of the Kingdom of Morocco to the United Nations
7 provided the UN Director of Protocol a formal written
8 notification of Benomar's appointment as a Special Advisor.

9 On August 27, the Permanent Mission sent a letter to
10 the Diplomatic Accreditation Officer of Host Country Affairs
11 for the United States Permanent Mission to the UN, explaining
12 that Benomar's, quote, "high rank of Special Advisor," unquote,
13 was intended to place him at the full diplomat level and
14 requesting that he be given the same identification as other
15 diplomats, such as Ministers Plenipotentiary.

16 Morocco had already issued a full diplomatic passport
17 on September 16, 2016 with an expiration date of
18 September 16, 2019. That passport was replaced this past
19 October with another diplomatic passport that will expire in
20 October 2022.

21 On September 21, 2018, Morocco's Permanent Mission
22 advised the U.S. Mission that Benomar enjoys the title of
23 Minister Plenipotentiary at the Permanent Mission of Morocco,
24 with full diplomatic privileges and immunities.

25 On October 5, the Moroccan Ministry for Foreign

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1 Affairs and International Cooperation affirmed Benomar's status
2 as a full-time Minister Plenipotentiary in the letter to the
3 U.S. Embassy in Rabat and the Minister Counselor of Host
4 Country Affairs at the U.S. Mission. The letter states that
5 Benomar serves as Minister Plenipotentiary conducting full-time
6 diplomatic duties and has served in that capacity since
7 November 1, 2017. That's Exhibit 5 to Benomar's supplemental
8 declaration. And that supplemental declaration, by the way, is
9 Document 49.

10 On October 10, the Moroccan Mission forwarded the
11 October 5, 2018 letter to the UN Office of Protocol. That's
12 Exhibit 6. The UN Blue Book, Protocol and Liaison Service, as
13 of October 31, 2018, lists Benomar as "Minister
14 Plenipotentiary." That's Exhibit 10 to Mr. Lowell's
15 declaration.

16 On November 13 of this year, the United States Mission
17 to the UN informed the Moroccan Mission to the UN that, quote,
18 "Mr. Benomar has been accredited, and if you wish, I can have
19 his passport available for retrieval in tomorrow's routine
20 pick-up. The Department of State Diplomatic ID card should be
21 in from Washington within the three to five business days,"
22 unquote. That's Exhibit 7 to Benomar's supplemental
23 declaration.

24 The following day, November 14, Mary Catherine Malin,
25 the Assistant Legal Advisor for Diplomatic Law and Litigation

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1 at the U.S. State Department, advised counsel for both
2 plaintiffs and defendant that the U.S. mission to the UN
3 acknowledges Benomar as a diplomat with full privileges and
4 immunities.

5 Her note is attached as Exhibit B to Mr. Wolosky's
6 affidavit, which is Document 45-1; and as Exhibit B to document
7 46. At pages 2 to 3, it reads as follows: Quote, "The
8 Permanent Mission of Morocco to the United Nations accredited
9 Mr. Benomar with the United Nations as a Minister
10 Plenipotentiary. Based on his assignment, the Moroccan Mission
11 requested from the United Nations privileges and immunities
12 that would normally be extended to a representative of a UN
13 mission in a similar capacity. The United Nations subsequently
14 notified the U.S. Mission regarding the Moroccan Mission's
15 request for privileges and immunities for Mr. Benomar. This
16 notification was processed pursuant to our normal course of
17 business and was reviewed by U.S. Mission personnel to ensure
18 it met the requirements set forth by U.S. law and the UN
19 Headquarters Agreement. Based on this information, the U.S.
20 Mission to the UN has registered Mr. Benomar with diplomatic
21 privileges and immunities as of November 13, 2018.
22 Representatives of the UN missions, including ministers,
23 receive diplomatic privileges and immunities based on the
24 application of the law, including the UN Headquarters
25 Agreement," unquote.

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1 Then the U.S. State Department sent, and Benomar
2 received, his blue diplomatic ID card, which is Exhibit 8 to
3 his supplemental declaration. The accompanying letter provides
4 as follows in part: Quote, "As MINISTER PLENIPOTENTIARY at the
5 Permanent Mission of MOROCCO to the United Nations, you are
6 entitled in the territory of the United States to the
7 privileges and immunities of a diplomatic envoy under the terms
8 of Section 15 of the Headquarters Agreement between the United
9 States and the United Nations," unquote.

10 It further provides, quote, "YOUR NAME WILL BE
11 INCLUDED on the next list of *Permanent Missions to the United*
12 *Nations - Officers Entitled to Diplomatic Privileges and*
13 *Immunities*," unquote.

14 In this case, plaintiffs allege that Benomar has, for
15 a long time, served the interests of the State of Qatar.
16 During his tenure at the UN, he allegedly used his official
17 position to advance the Qatari agenda, and while serving as the
18 UN envoy for Yemen, he allegedly reflected a bias towards the
19 interests of Qatar. That's in Paragraphs 6 and 7 of the
20 complaint.

21 Telephone records of Benomar show that he had frequent
22 phone contact between October 2017 and June 2018 with senior
23 Qatari officials and alleged members of the conspiracy as
24 described in the California action. That's Paragraph 8.

25 Plaintiffs allege that Benomar was a, quote, "key

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1 player," unquote, in the review, analysis, categorization, and
2 distribution of the stolen documents. That's in Paragraph 17.

3 Plaintiffs further allege that the State of Qatar
4 sponsors and supports terrorism; that President Trump has
5 denounced it; and that several Middle Eastern countries have
6 imposed an economic embargo on it and demanded that it stop
7 funding terrorists. That's Paragraph 25 to 28.

8 Plaintiffs further allege that the international
9 sanctions and President Trump's support for them, quote,
10 "threaten to devastate Qatar's economy and plunge Qatar into
11 crisis," unquote. That's from Paragraph 29. Qatar allegedly
12 responded to the sanctions by trying to build influence within
13 the United States, and Benomar, on information and belief,
14 quote, "helped to mastermind Qatar's strategy," unquote.
15 That's from Paragraph 30.

16 Part of the strategy was to try to curtail the
17 influence of prominent Americans, like plaintiff Broidy, who
18 were opposed to Qatar. Broidy was a vocal critic of Qatar's
19 support for terrorists and Qatar's friendly relationship with
20 Iran. He provided financial support for public initiatives,
21 such as conferences, to educate Americans about Qatar's support
22 for terrorist organizations.

23 During 2017 and '18, according to the complaint, he
24 conveyed his criticism of Qatar in meetings with U.S.
25 government officials, including President Trump. Qatar was

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1 aware of Broidy's criticism of Qatar's policy and efforts to
2 influence American opinion leaders and allegedly specifically
3 focused its efforts on him. For example, Qatari officials
4 allegedly believed Broidy had prompted President Trump's public
5 criticism of Qatar in June 2017. This is in Paragraphs 34
6 through 38.

7 In late 2017 and early 2018, Qatar, acting through
8 agents both in the U.S. and abroad, allegedly conducted a
9 sophisticated computer hack on plaintiffs' California-based
10 computer systems. The attack, which plaintiffs allege appears
11 to have been executed from locations in at least Qatar and the
12 United States, resulted in the theft of many gigabytes of data
13 from plaintiffs, including trade secrets and personal
14 information.

15 After the documents and information were taken from
16 plaintiffs' computer systems, they were organized thematically
17 for distribution to the media. That's Paragraphs 39 through
18 41.

19 Plaintiffs allege on information and belief that
20 Benomar, aware that the documents been stolen from plaintiffs,
21 was a, quote, "key participant in this process," unquote, and
22 that's from Paragraph 42; and, quote, "helped to mastermind the
23 dissemination of stolen materials to the media and other third
24 parties," unquote, that's Paragraph 43. As part of his
25 involvement with the conspiracy, Benomar allegedly spoke

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1 regularly with senior Qatari officials about elements of the
2 conspiracy. That's also in Paragraph 43.

3 Starting in late February 2018 and continuing
4 thereafter, members of the conspiracy allegedly distributed the
5 stolen materials to media outlets in the U.S. and abroad, which
6 subsequently published articles based on those materials.

7 The procedural background is as follows: Plaintiff
8 filed this lawsuit on July 23 of this year. The complaint
9 raises four claims: misappropriation of trade secrets in
10 violation of the Defend Trade Secrets Act, 18 U.S. Code,
11 Section 1836 *et seq.*; conversion of stolen property; unjust
12 enrichment; and civil conspiracy.

13 The case was reassigned to me on September 6. On
14 October 31, defendant filed the motion. Plaintiffs filed
15 their opposition on November 14. On the same day, November 14,
16 defendant submitted a letter notifying the Court that the
17 United States had approved Benomar's status as a Minister
18 Plenipotentiary, entitled to full diplomatic immunity. And on
19 November 21, defendant filed his reply papers.

20 On November 26, plaintiffs filed a letter explaining
21 their intention to seek leave to file an amended complaint
22 considering the defendant's introduction of new facts and
23 arguments related to the defendant's diplomatic status. That
24 letter is Document 51. And defendant responded the next day by
25 letter, which is Document 52.

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1 On November 30, plaintiff then filed a letter formally
2 seeking leave to amend, to which the defendant replied on
3 December 2. Those are 53 and 54. And I told the parties I
4 would let them know how I plan to proceed. So let me turn to
5 the motion.

6 A couple of preliminary issues: First, on a motion to
7 dismiss under Rule 12(b)(1), the court may look to affidavits
8 and other evidence outside the pleadings to resolve disputed
9 jurisdictional fact issues. *Eastern Paralyzed Veterans v.*
10 *Lazarus-Burman*, 133 F. Supp. 2d 203, 208 (E.D.N.Y. 2001).
11 Where jurisdictional facts are disputed, the court has the
12 power and the obligation to consider matters outside the
13 pleadings, such as affidavits, documents, and testimony, to
14 determine whether jurisdiction exists. *Sokolowski v. MTA*, 849
15 F. Supp. 2d 412, 414 (S.D.N.Y. 2012), *affirmed* 723 F.3d 187 and
16 529 F. App'x 48. But a district court may not rely on
17 conclusory or hearsay statements contained in the materials
18 outside the pleadings. *J.S. ex rel. N.S. v. Attica Central*
19 *Schools*, 386 F.3d 107, 110.

20 Both parties attached documents to their submissions.
21 Defendant submitted an affidavit from the defendant, which is
22 39, and another from Mr. Lowell, which is 40 on the docket.
23 Defendant provided Mr. Wolosky's affidavit with exhibits, and
24 the defendant provided more documents, including a supplemental
25 declaration from Mr. Benomar with exhibits, which is 49. I'll

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1 consider the affidavits and any properly authenticated exhibits
2 as I am to do under Rule 12(b)(1).

3 As part of their submissions, both parties also
4 included expert reports. Federal Rule of Evidence 702 requires
5 me to determine whether an expert's testimony is based on
6 scientific, technical, or other specialized knowledge that will
7 help the trier of fact. By definition, expert testimony that
8 tells the trier of fact what result to reach does not help the
9 trier of fact. See *Nationwide Transport v. Case Information*
10 *Systems*, 523 F.3d 1051, 1058-59 (9th Cir. 2008); and *U.S. v.*
11 *Duncan*, 42 F.3d 97, 101 (2d Cir. 1994).

12 Accordingly, as a general rule, an expert's testimony
13 on issues of law is inadmissible. *U.S. v. Bilzerian*, 926 F.2d
14 1285, 1294. Although an expert may opine on an issue of fact
15 within the province of a trier of fact, he may not
16 give testimony stating ultimate legal conclusions based on
17 those facts. That's *Bilzerian* at 1294.

18 Additionally, an expert may not merely narrate facts
19 as doing so does not constitute offering opinions on the basis
20 of specialized knowledge or expertise and may also invade the
21 province of the trier of fact. *Travelers Indemnity v. Northrup*
22 *Grumman*, 2014 WL 464769, at *3 (S.D.N.Y. Jan. 28, 2014).

23 Here, the plaintiffs filed an expert opinion of
24 David P. Stewart, who is a Professor from Practice at
25 Georgetown University Law Center, that's Document 45-4; and the

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1 defendant filed the declaration of Bruce Rashkow, a lecturer at
2 Columbia Law School, that's Document 50. Both expert reports
3 contain discussions about acquiring diplomatic immunity under
4 the controlling statutes and international agreements.

5 Under Rule 702 and the pertinent law, the experts
6 are precluded from opining on which side's version of the facts
7 is correct, marshaling arguments from the evidence, and
8 offering legal conclusions concerning whether or not Benomar
9 has diplomatic immunity or whether or not an exception to the
10 Vienna Convention applies. Making arguments from facts in
11 evidence is the lawyer's job, and is not an exercise of the
12 witness' specialized knowledge.

13 The experts can, however, provide testimony based on
14 their specialized knowledge that falls short of a legal
15 conclusion, but will help the trier of fact: for example, they
16 can explain how a diplomat acquires diplomatic immunity or
17 point the Court to relevant provisions of the Vienna Convention
18 and other controlling international agreements and statutes.
19 But whether Benomar is entitled to immunity is not a subject of
20 proper expert opinion.

21 Therefore, I've considered the testimony from the
22 experts only to the extent the opinions provided specialized
23 knowledge regarding procedures and provisions related to
24 diplomatic immunity, but I've disregarded opinions on what the
25 law is or what conclusions I should reach on the facts or the

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1 law.

2 Turning now to the legal standards: Because federal
3 courts are courts of limited jurisdiction, a claim must be
4 dismissed if a court lacks subject matter jurisdiction over it.
5 *See Frontera Resources v. State Oil Company of Azerbaijan*, 582
6 F.3d 393, 397. A case is properly dismissed for lack of
7 subject matter jurisdiction under Rule 12(b)(1) when the
8 district court lacks the statutory or constitutional power to
9 adjudicate it. *Makarova v. United States*, 201 F.3d 110, 113.
10 A plaintiff asserting subject matter jurisdiction has the
11 burden of proving by a preponderance of the evidence that it
12 exists. That's *Makarova* at 113.

13 Diplomatic immunity is a matter of subject matter
14 jurisdiction. *Swarna v. Al-Awadi*, 607 F. Supp. 2d 509, 515
15 (S.D.N.Y. 2009), *affirmed in part, vacated in part, and*
16 *remanded on other grounds*, 622 F.3d 123; *see, e.g., Hilt*
17 *Construction v. Permanent Mission of Chad*, 2017 WL 4480760, at
18 *1 (S.D.N.Y. Oct. 6, 2017).

19 Plaintiffs argue that because no court has considered
20 who has the burden of proving or disproving immunity in the
21 context of a diplomat making such a claim under the Vienna
22 Convention, I should adopt the procedure applied in cases where
23 courts make immunity determinations under the Foreign Sovereign
24 Immunities Act, or FSIA, 28 U.S. Code Section 1602 *et seq.*, and
25 require the defendant to make out a *prima facie* case that he is

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1 immune, which then shifts the burden back to plaintiffs to
2 prove an exception to the immunity, with the ultimate burden of
3 persuasion remaining with the defendant. Plaintiffs make that
4 argument in its opposition at pages 2 to 3.

5 I decline the suggestion that I use the FSIA as an
6 interpretative guide for the Vienna Convention. As the
7 Fourth Circuit has observed, when also declining to do so,
8 quote, "The FSIA is a statute which establishes the framework
9 for determining when federal or state courts in the United
10 States may exercise jurisdiction over foreign states; it is not
11 a treaty dealing with many countries. In addition, the FSIA
12 was enacted after the Vienna Convention on Diplomatic Relations
13 came into existence, and thus, could not have been a textual
14 source for Convention delegates. Furthermore, Congress did not
15 intend for the FSIA to affect diplomatic immunity under the
16 Vienna Convention. Section 1609 specifically states that
17 Congress enacted the FSIA subject to existing international
18 agreements to which the United States is a party at the time of
19 the enactment of this act," unquote. *Tabion v. Mufti*, 73 F.3d
20 535, 538 n.7 (4th Cir. 1996). And I've omitted the citation to
21 the legislative history - House Report 1487.

22 So I will not follow the FSIA and, instead, will apply
23 the usual rule that where a defendant challenges the court's
24 subject matter jurisdiction under Rule 12(b)(1), that puts the
25 burden on the plaintiffs, but I think here the result would be

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1 the same, even if defendant had the initial *prima facie* burden
2 and plaintiff then had to show an exception.

3 Motions under Rule 12(b)(1) may attack either the
4 sufficiency or the truth of the allegations supporting subject
5 matter jurisdiction. *Wells Fargo v. Ullah*, 2014 WL 470883, at
6 *2 (S.D.N.Y. Feb. 6, 2014). Quote, "In a facial challenge, the
7 court accepts as true the uncontroverted factual allegations in
8 the complaint. By contrast, in connection with a factual
9 challenge, the court's review is not confined to the pleadings,
10 but may examine extraneous evidence submitted with the motion
11 and make any findings of fact necessary to determine the
12 existence of subject matter jurisdiction. In that event, the
13 court is not obligated to accord presumptive truthfulness to
14 the allegations of the complaint. Rather, it may weigh the
15 evidence on the record accompanying the Rule 12(b)(1) motion or
16 hold an evidentiary hearing and decide for itself the merits of
17 the jurisdictional dispute. Finally, the burden of proving
18 jurisdiction is on the party asserting it," unquote. *Dow Jones*
19 *v. Harrods*, 237 F. Supp. 2d 394, 404 (S.D.N.Y. 2002), *affirmed*
20 346 F.3d 357.

21 The present case involves a factual attack and not a
22 facial attack. It's undisputed that absent immunity, the Court
23 would have subject matter jurisdiction under federal question
24 jurisdiction, 28 U.S. Code Section 1331, or diversity
25 jurisdiction, 28 U.S. Code 1332, and plaintiffs do not dispute

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1 that defendant's attack is limited to a factual attack. In
2 their opposition at page 2, they state, quote, "Benomar has not
3 challenged plaintiffs' jurisdictional allegations but, instead,
4 has introduced a claim that he is entitled to immunity as a
5 diplomatic agent and a foreign official, and therefore, the
6 Court lacks jurisdiction."

7 Accordingly, (1) the burden is on the plaintiffs to
8 prove jurisdiction by a preponderance of the evidence; (2) I am
9 not required to presume the truthfulness of plaintiffs'
10 complaint; and (3) I may examine evidence submitted by the
11 parties.

12 With these principles in mind, I now turn to the
13 merits: Benomar contends that dismissal is mandated by federal
14 statute and the Vienna Convention on Diplomatic Relations -
15 which I'm going to call either the VCDR or the Vienna
16 Convention - because he is a currently-serving accredited
17 diplomat entitled to immunity from civil jurisdiction in the
18 United States. He argues that he's absolutely immune from suit
19 in this country as a diplomat of the Kingdom of Morocco and
20 that his status immunity protects him from legal actions of any
21 kind, including civil lawsuits and discovery from the moment
22 the U.S. was notified of his diplomatic status. See
23 defendant's memorandum at pages 2 to 3 and 14 to 21.

24 Under Article 31(1) of the Vienna Convention, a
25 current diplomatic agent enjoys near absolute immunity from

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1 civil jurisdiction. This immunity is given full effect under
2 U.S. law pursuant to the Diplomatic Relations Act, 22 U.S.
3 Code, Section 254d, which states, quote, "Any action or
4 proceeding brought against an individual who is entitled to
5 immunity with respect to such action or proceeding under the
6 Vienna Convention," unquote, shall be dismissed.

7 As the preamble to the Vienna Convention recognizes,
8 the purpose of such immunity is not to benefit individuals, but
9 to ensure the efficient performance of the functions of
10 diplomatic missions as representing states.

11 The Second Circuit has recognized that under the
12 Vienna Convention, current diplomatic envoys enjoy absolute
13 immunity from civil and criminal process. *Brzak v. United*
14 *Nations*, 597 F.3d 107, 113; see *Tachiona v. United States*, 386
15 F.3d 205, 215, where the court said, quote, "With limited
16 exceptions, the Convention broadly immunizes diplomatic
17 representatives from the civil jurisdiction of the U.S.
18 Courts," unquote; and *Swarna v. Al-Awadi*, 622 F.3d 123, 137,
19 where the Circuit said sitting diplomats get near absolute
20 immunity in the receiving state to avoid interference with the
21 diplomat's service for his or her government.

22 Article 31 of the Convention provides narrow
23 exceptions to this diplomatic immunity, one of which -
24 commercial activity - is raised by plaintiffs here.

25 So, Article 31(1) and subsection (c) read as follows:

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1 A diplomatic agent shall enjoy immunity from the criminal
2 jurisdiction of the receiving state. He shall also enjoy
3 immunity from its civil and administrative jurisdiction, except
4 in the case of an action relating to any professional or
5 commercial activity exercised by the diplomatic agent in the
6 receiving state outside his official functions.

7 It seems the parties agree that defendant has shown in
8 the first instance that he is a diplomatic agent with the
9 position of Minister Plenipotentiary at Morocco's Permanent
10 Mission to the UN as accredited by the Ministry of Foreign
11 Affairs and International Cooperation of the Kingdom of
12 Morocco, as acknowledged by the UN, and as notified to the U.S.
13 through its Permanent Mission to the UN, see Benomar's
14 supplemental declaration, Exhibits 4 through 8, and thus, that
15 he is entitled to diplomatic immunity unless an exception
16 applies.

17 Indeed, before defendant had the blue-bordered
18 diplomatic identification card, plaintiffs had argued in their
19 opposition at page 4 that the State Department's immunity
20 determination controls what immunity status Benomar has and, at
21 page 9, that the Court should defer to the State Department's
22 determination. Even the plaintiff's expert Professor Stewart
23 said that the identity card is the definitive document issued
24 by the State Department after its review of an application for
25 immunity. That's in Paragraph 20 of his declaration. And the

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1 Restatement (Third) of Foreign Relations Section 464, which
2 plaintiffs cite at page 5, provides: "In the United States, a
3 person's diplomatic status is established when it is recognized
4 by the Department of State."

5 The United States UN mission has now confirmed that
6 the U.S. has registered defendant with diplomatic privileges
7 and immunities in recognition of the fact that the Permanent
8 Mission of Morocco to the UN accredited Mr. Benomar with the UN
9 as a Minister Plenipotentiary. See Exhibit B to Mr. Wolosky's
10 affidavit. This recognition was followed by the United States
11 providing defendant with the blue ID card that plaintiffs
12 argued was necessary for him to have immunity. The
13 accompanying letter says that he is entitled to the privileges
14 and immunities of a diplomatic envoy. And plaintiffs
15 acknowledge in Document 53 at page 2, that the defendant's
16 presentation of the blue-bordered State Department diplomatic
17 ID card establishes that Benomar has been accredited as a
18 diplomatic agent and is entitled to status immunity.

19 And, quote, "In proceedings where a person's
20 diplomatic status is contested, courts generally consider the
21 State Department's determination to be conclusive," unquote.
22 *U.S. v. Khobragade*, 15 F. Supp. 3d 383, 385 n.16 (S.D.N.Y.
23 2014) (collecting cases); see *Gonzalez Paredes v. Vila*, 479
24 F. Supp. 2d 187, 194 (D.D.C. 2007) where the court said, quote,
25 "The Department of State certified the defendants' diplomatic

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1 status, and it is not for this Court to revoke or question it,
2 but, rather, only to determine if an exception to diplomatic
3 immunity set forth in the Convention applies," unquote.

4 So, the questions remaining are whether the plaintiffs
5 have a meritorious argument that undermines Benomar's immunity.

6 They first raise the notice requirement. Benomar
7 argues his immunity has been effective from the moment the
8 United States received notification of his appointment. That's
9 in his brief at page 17. Under Article 39 subsection (1) of
10 the VCDR, quote, "[e]very person entitled to privileges and
11 immunity shall enjoy them...if already in its territory, from
12 the moment when his appointment is notified to the Ministry of
13 Foreign Affairs," unquote.

14 Under Article 39, agents are entitled to immunity at
15 the moment of notification to the appropriate authorities of
16 the receiving state, even if they have already entered the
17 territory. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 297 n.171
18 (S.D.N.Y. 2001), *affirmed in part, reversed in part on other*
19 *grounds, and remanded*, 386 F.3d 205.

20 As plaintiffs' expert Professor Stewart explains in
21 paragraph 14 of his declaration, quote, "When the appropriate
22 authorities of the receiving state do accredit an individual as
23 a member of the sending state's diplomatic mission...that
24 individual's entitlement to immunity will be considered to have
25 commenced either upon the moment the individual enters the

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1 country to take up the post, or if the individual is already in
2 the receiving state, when notice was made to the Ministry for
3 Foreign Affairs," unquote.

4 The defendant provided exhibits that reflect that no
5 later than September 21 or October 5, 2018, Morocco expressly
6 notified the U.S. of Benomar's appointment as a Minister
7 Plenipotentiary. See Exhibits 4 and 5 to the defendant's
8 supplemental declaration.

9 Plaintiffs point to the language in Article 39, quote,
10 "if already in its territory," unquote, and note that Benomar
11 never stated in his declaration that he was in the United
12 States on either date.

13 In his supplemental declaration, Benomar avers that he
14 was in the U.S. on both dates and that he had returned from
15 international travel back into the U.S. on September 15 and has
16 remained in the U.S. continuously from that date through at
17 least the date of his declaration. He provided a copy of the
18 U.S. Customs stamp he received on September 15 reflecting his
19 entry into the country that day. That's Exhibit 1 to the
20 supplemental declaration. I, therefore, find his immunity was
21 effective upon Morocco's notice of his appointment.

22 Further, even if he were not in the United States on
23 those dates, it seems clear, based on plaintiffs' expert report
24 and the language of the treaty, that the immunity is to be
25 effective from the time of notification if the person is

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1 already living here when appointed, or from the time of arrival
2 in the United States if the person is residing abroad when
3 appointed. So, Benomar would be covered from the time of
4 notification, as long as he was living here - which he was -
5 even if he happened to be on a trip out of the United States at
6 that moment.

7 Turning now to the requirement of permanent residency.
8 Plaintiffs argue that a diplomat who is, quote, "permanently
9 resident in," unquote, the receiving state is not entitled to
10 full immunity. That's in their brief at pages 11 to 12, citing
11 Article 38(1) of the VCDR, which provides that a diplomatic
12 agent who is, quote, "permanently resident in," unquote, the
13 receiving state, quote, "shall enjoy only immunity from
14 jurisdiction and inviolability in respect of official acts
15 performed in the exercise of its functions," unquote.

16 Plaintiffs argue that because Benomar has lived in the
17 United States with his family, all of whom are U.S. citizens,
18 on a continuous basis since the early 1990s, he is not entitled
19 to "full status immunity" but only "official acts" immunity.

20 There is not a lot of precedent with respect to
21 Article 38(1). Both sides point to State Department documents.
22 While not binding, quote, "the meaning attributable to treaty
23 provisions by the government agencies charged with their
24 negotiation and enforcement is entitled to great weight."
25 *Sumitomo Shoji America v. Avagliano*, 457 U.S. 176, 184-85

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1 (1982).

2 Plaintiffs point the Court to the State Department
3 Judicial Guidance and assert at page 11 of their brief that
4 being permanently resident in the United States for these
5 purposes is not the same as being a lawful permanent resident,
6 commonly known as a green card holder. And they cite to a
7 Department of State publication from 2015 called "Diplomatic
8 and Consular Immunity: Guidance for Law Enforcement and
9 Judicial Activities." And that you can find at the following
10 url: [https://www.state.gov](https://www.state.gov/documents/organizations/150546.pdf) -- actually, I don't know if these
11 are slashes or back-slashes --
12 [.gov/documents/organizations/150546.pdf](https://www.state.gov/documents/organizations/150546.pdf). And they quote to
13 page 9 of that document.

14 It may be so that being permanently resident in the
15 U.S. is not the same as being a green card holder, but that
16 does not really help plaintiffs with respect to this defendant.
17 That Guidance at page 9 says that the United States -- now I'm
18 quoting -- "the United States as a matter of policy does not
19 normally accept as diplomatic agents its own nationals, legal
20 permanent residents of the United States, or others who are
21 permanently resident in the United States," unquote. That
22 suggests that because the United States has accepted the
23 defendant as a diplomatic agent, he is not considered to be,
24 quote, "permanently resident" in the United States.

25 Indeed, the Guidance goes on to say that police

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1 officers, quote, "should not have to deal with this distinction
2 since the U.S. Department of State issues cards...with the
3 nationality principle in mind," unquote.

4 Because the Department of State has issued the
5 defendant a blue-bordered identity card which is for diplomatic
6 agents, it must not regard defendant as permanently resident in
7 the United States.

8 Plaintiffs also point to a page on the State
9 Department's website that discusses privileges and immunities
10 and says that they do not apply unless the employing foreign
11 state documents that it pays for the employee's travel to and
12 from the United States, which Morocco has not documented.
13 But as defendant correctly notes, the provision cited by
14 plaintiffs only applies to A-2 visa holders, but does not apply
15 to Benomar who holds the higher G-1 visa. And that web page is
16 at
17 [https://www.state.gov/ofm/accreditation/privilegesandimmunities](https://www.state.gov/ofm/accreditation/privilegesandimmunities/index.htm)
18 [/index.htm](https://www.state.gov/ofm/accreditation/privilegesandimmunities/index.htm).

19 The defendant's expert points to a Circular Note that the
20 State Department issued in 1991 that provides a definition of,
21 quote, "permanently resident," unquote, but only in regard to
22 administrative and technical and service staff.

23 The Circular Note, dated April 10, 1991, can be found
24 at <https://www.state.gov/documents/organization/58891.pdf>. The
25 Circular Note states that, quote, "The United States has, for

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1 the sake of its own convenience, equated [the term 'permanently
2 resident in'] with the status of 'permanent resident alien'
3 as...employed in U.S. Immigration Law." So it's saying that,
4 as of the date of that Circular Note, the U.S, for its own
5 convenience, equated permanent residency with being a green
6 card holder.

7 It then goes on to explain a change. It says that "the
8 State Department has determined that members of the
9 administrative and technical and service staffs of diplomatic
10 missions...will be considered permanently resident in the
11 United States for purposes of the Vienna Convention, unless the
12 employing foreign state provides appropriate documentation,"
13 unquote, showing that it pays for travel and undertakes to
14 transfer the employee out of the U.S. within a specific time
15 frame consistent with the sending state's transfer policy."

16 So for administrative, technical, and service staffs,
17 there's a change in how the U.S. regards permanent residence,
18 but the absence of any such change with respect to diplomatic
19 agents like defendant suggests that no such documentation is
20 required for them to avoid being considered permanently
21 resident in the United States, and that with respect to
22 diplomatic agents, quote, "permanently resident in" the United
23 States continues to be equated with being a permanent resident
24 alien, a/k/a green card holder, which defendant is not.

25 Finding these sources to be suggestive of immunity but

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1 not determinative, I am left with the facts and the burden of
2 persuasion. From what I know from the record, Benomar was born
3 in Morocco, is a citizen of the UK, has no U.S. immigration
4 status, and has been in this country on visas at all relevant
5 times, albeit in jobs requiring frequent travel abroad.

6 The State Department has issued him a blue-bordered
7 identity card that reflects his entitlement to the privileges
8 and immunities of a diplomatic envoy. The State Department was
9 no doubt aware of the amount of time Benomar has spent in the
10 United States.

11 Plaintiffs have provided no authority - and I know of
12 none - for the proposition that a career diplomat whose jobs
13 have led him to live in the U.S. for an extended period, is to
14 be considered the equivalent of a national or a lawful
15 permanent resident under the VCDR.

16 The State Department obviously does not interpret the
17 term, quote, "permanently resident in the United State,"
18 unquote, that way, and nobody else seems to, either. So I find
19 that plaintiffs' argument in this regard unavailing.

20 Next, plaintiffs make two related arguments related to
21 Benomar's commercial activities.

22 First, they argue that under Article 42 of the Vienna
23 Convention, when a diplomat engages in, quote, "any
24 professional or commercial activity," unquote, the person is
25 not entitled to absolute immunity as a matter of both U.S. and

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1 international law.

2 Under Article 42, quote, "[a] diplomatic agent shall
3 not, in the receiving state, practice for personal profit any
4 professional or commercial activity," unquote. To supplement
5 this claim, plaintiffs cite to a Circular Note published by the
6 U.S. Mission to the UN in 2016, which can be found at
7 <https://www.state.gov/documents/organization/58891.pdf>. That
8 Circular Note says that diplomatic privileges and immunities
9 would apply only to individuals who meet criteria, including
10 that they perform on behalf of the member state diplomatic
11 duties directly related to the work of the UN on a full-time
12 basis, which the Department of State describes as at least 35
13 hours each week at the Mission, and shall not practice for
14 profit any professional or commercial activity in the United
15 States. And that is called U.S./UN Circular Note HC-01-06,
16 dated January 13, 2016.

17 Plaintiffs argue that defendant has failed to satisfy
18 these criteria and, therefore, is not entitled to diplomatic
19 immunity. They argue he's provided no evidence that he works
20 at least 35 hours a week at the Mission, and because he engages
21 in for-profit professional and commercial activity, he is not
22 entitled to diplomatic immunity under Article 42.

23 The related argument is that the commercial activities
24 exception to full status immunity is applicable under VCDR
25 Article 31(1)(c), which, as I noted earlier, excepts from

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1 immunity, quote, "an action relating to any professional or
2 commercial activity exercised by the diplomatic agent in the
3 receiving state outside his official function," unquote.

4 As a preliminary matter, defendant has provided
5 evidence that his duties for Morocco are full time. He has
6 provided his own declaration, see paragraph 31; and the
7 October 5, 2018 Moroccan Ministry of Foreign Affairs note,
8 which is Exhibit 5 to his supplemental declaration, both of
9 which say he works full time.

10 With respect to the commercial exception, quote,
11 "[T]here are few published decisions of U.S. courts
12 interpreting the 'commercial activity' exception found within
13 Article 31(1)(c) of the Vienna Convention," unquote. *Gonzalez*
14 *Paredes*, 479 F. Supp. 2d at 192.

15 The most expansive decision on Article 31(1)(c) of
16 which I'm aware is from 1995, a case from the Eastern District
17 of Virginia, *Tabion v. Mufti*, 877 F. Supp. 285, 292 (E.D. Va.
18 1995), *affirmed*, 73 F.3d 535 (4th Cir. 1996). In granting the
19 defendant's motion to quash a subpoena on the grounds of
20 immunity, Judge Ellis of the Eastern District of Virginia
21 assessed the meaning of the Vienna Convention's use of the
22 phrase, quote, "commercial activity," unquote, by analyzing the
23 negotiating and drafting history of the treaty which suggested
24 that the insertion of "commercial" after "professional" was
25 something of a redundant afterthought. See 877 F. Supp. at 290

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1 & n.10.

2 After his analysis, Judge Ellis made the following
3 observations about the Vienna Convention. Now I'm quoting:

4 "At all stages, the treaties drafting and negotiating
5 history points persuasively to the conclusion that Article
6 31(1)(c) was not intended to carve out a broad exception to
7 diplomatic immunity for a diplomat's daily contractual
8 transactions for personal goods and services. Activities such
9 as purchasing a car, sending clothing to a tailor, and hiring a
10 domestic servant certainly are not, quote, 'wholly
11 inconsistent,' unquote, with a diplomat's functions. Nor are
12 such activities particularly 'unusual' or prohibited by Article
13 42. Yet those involved in the drafting process consistently
14 questioned the need to provide an immunity exemption for
15 commercial activities when diplomats were already barred from
16 those activities. Thus, it is evident that the phrase
17 'commercial activity' in the Vienna Convention means a business
18 or trade activity for profit and that Article 31(1)(c) was
19 intended to reach those rare instances where a diplomatic agent
20 ignores the restraints of his office and, contrary to Article
21 42, engages in such activity in the receiving state.

22 Accordingly, a diplomat who strays from his diplomatic
23 functions and runs a car business or becomes a tailor in the
24 receiving State cannot then shelter himself behind diplomatic
25 immunity when disputes arise out of that activity. Not only is

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1 this broader construction of immunity clearly consistent with
2 the drafters' intent, but it also follows the fundamental
3 principle that treaties should be liberally construed so as to
4 enlarge, rather than restrict, rights that signatory nations
5 may claim under them."

6 That's *Tabion*, 877 F. Supp. at 291.

7 Judge Ellis also state cited to the State Department's
8 written response to a question pertaining to the scope of
9 Article 31(1)(c) submitted to Congress during hearings on
10 diplomatic privileges and immunities in 1988.

11 The State Department wrote, quote, "The ideas of
12 remuneration and of a continuous activity are central to the
13 purpose of Article 31(1)(c)," unquote. That's *Tabion* at 292
14 n.12, which contains the cite to that State Department
15 document.

16 Plaintiffs allege that Benomar was personally paid
17 millions of dollars in commercial fees and that his business
18 partner, Joseph Allaham, threatened to sue him for \$5- to
19 \$10 million for money Allaham earned from Qatar but did not
20 receive. That's in plaintiffs' opposition at page 17 and
21 Mr. Wolosky's declaration, Exhibit A.

22 Plaintiff argues that Benomar was involved in the
23 hacking conspiracy as part of a commercial enterprise. That's
24 at page 17. And they further allege at pages 13 to 14 that his
25 position on the board of a multinational media company, called

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1 Lagardère SCA, constitutes commercial activity.

2 Defendant's arguments in response -- well, in his
3 first memorandum and in his response, in his reply memorandum,
4 can be boiled down to three assertions that address both of
5 plaintiffs' commercial activity arguments.

6 The defendant says he didn't engage in any systematic
7 trade or business activity within the U.S. for personal profit;
8 that the advice he provided to Qatar was at the request of
9 Morocco and part of his official functions; and that the
10 commercial activity exception has been used only where the
11 counter-party is commercially, quote, "across the table,"
12 unquote, from the defendant-diplomat. That's at page 21 of the
13 defendant's brief.

14 I reject the third argument. None of the cases cited
15 by defendant imposed an, quote, "across the table," unquote,
16 arrangement as a legal requirement to the commercial activity
17 exception, and I don't find such an arrangement necessary to
18 satisfy the exception.

19 In turning to the defendant's other two arguments, I
20 again find not a lot of helpful law. Many of the cases deal
21 with extremes. They contrast a diplomat's day-to-day, everyday
22 purchases at the retail level to a diplomat running a business
23 or practicing a profession at the other extreme.

24 I don't know if I said that right.

25 They compare a diplomat's everyday retail purchases to

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1 a diplomat running a business or practicing a profession.

2 So, again, I look to the evidence in the record and
3 the burden of persuasion. It was plaintiffs' responsibility to
4 bring to the table evidence to help me decide this
5 jurisdictional question. This jurisdictional question,
6 plaintiffs' commercial activity arguments - under Article 31
7 and 42 - fall short because I do not find plaintiffs have
8 sufficiently provided evidence that Benomar has engaged in
9 commercial activities.

10 First, his position with the supervisory board of
11 Lagardère SCA is not commercial activity under the VCDR.
12 Plaintiffs have made no showing that this position involves any
13 activity within the United States as the VCDR requires. The
14 only evidence I have on it is from Mr. Benomar's supplemental
15 declaration where he says the only requirements of the job are
16 attending a meeting every three months, which is hardly enough
17 to render him less than a full-time diplomat, which he asserts
18 he is. He further says that he has not received any
19 remuneration for this position. So, despite whatever ambiguity
20 there may be about what a commercial activity is under the
21 VCDR, at a minimum, the activity must take place, quote, "in
22 the receiving state," unquote. That's from 31(1)(c). And it's
23 unlikely the definition of commercial activity would include
24 non-profit-making work. So, the only evidence of record is
25 that the board position does not bring Benomar within the

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1 exception.

2 Second, plaintiffs' bald allegations that Benomar
3 participated in (and was paid millions of dollars for)
4 participating in the scheme to illegally hack plaintiffs'
5 computers and distribute the results to the press, also does
6 not satisfy the commercial activities exception for the
7 following reasons:

8 Whatever the precise definition of commercial activity
9 under the VCDR is, it is obvious that paying cyberhackers to
10 hack plaintiffs' computers or getting paid to distribute stolen
11 material is not, quote, "professional or commercial," unquote,
12 as those terms are commonly understood.

13 Judge Ellis offered the examples of a diplomat running
14 a car dealership or being a tailor in *Tabion* at 291. And in
15 *Barbata v. Latamie*, 2012 WL 2422740, at *2 (S.D.N.Y. June 26,
16 2012), Judge Cote found commercial activity outside of any
17 official functions regarding a diplomat who had made an
18 agreement to purchase a portfolio of art prints. These
19 ordinary clearly commercial activities are of a different ilk
20 from the world of cybercrime and distribution of stolen
21 property.

22 Simply put, the complex hacking conspiracy described
23 in plaintiffs' complaint does not describe an example of the
24 common understanding of commercial activity, especially
25 considering that plaintiffs allege that this conspiracy was at

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1 the direction of a foreign government.

2 While many crimes could be regarded as commercial
3 because they are designed to make money, here, the goal of the
4 defendant and his alleged co-conspirators is alleged to be
5 political, not monetary.

6 The Fourth Circuit, affirming Judge Ellis' decision in
7 *Tabion*, said that commercial activity does not include, quote,
8 "occasional service contracts," unquote, but did include,
9 quote, "trade or business activity, engaged in for personal
10 profit," unquote. 73 F.3d at 537.

11 Defendant's alleged assistance to Qatar strikes the
12 Court as closer to the former. It is not a business or job
13 defendant is alleged to have set up alongside or in place of
14 his day job as a diplomat, but, rather, is alleged to be a
15 several-month international espionage project. The State
16 Department, as indicated earlier, indicated that remuneration
17 and continuous activity are central to the purpose of 31(1)(c).
18 The activity alleged here is akin to a consulting gig doable in
19 one's spare time while working full-time as a diplomat.

20 In so construing the commercial activity exception, I
21 am mindful that, quote, "treaties are to be construed in a
22 broad and liberal spirit, and when two constructions are
23 possible, one restrictive of the rights that may be claimed
24 under it and the other favorable to them, the latter is to be
25 preferred," unquote. That's *Asakura v. City of Seattle*, 265

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1 U.S. 332, 342 (1924). Interpreting, quote, "professional or
2 commercial activity," unquote, to exclude the time-limited,
3 illicit, foreign-directed, politically-motivated conduct
4 alleged to have occurred here is the interpretation that
5 enlarges the rights that may be claimed under the VCDR. See
6 *Jordan v. K. Tashiro*, 278 U.S. 123, 127.

7 More fundamentally, however, even if cybercrime were
8 considered to be commercial activity, plaintiffs have not
9 established by a preponderance of the evidence that Benomar was
10 involved in the activity or did it for money. Their
11 allegations regarding his participation are almost entirely on
12 information and belief, with no basis for that information and
13 belief stated.

14 The only evidence they provided was a few lines of a
15 deposition transcript in which Joseph Allaham states he is owed
16 \$5- to \$10 million by Qatar and was thinking of suing Benomar
17 over it because he could not get a straight answer about it.
18 This is in Exhibit A to Mr. Wolosky's declaration around pages
19 380 to 381.

20 This inscrutable excerpt does not show that Benomar
21 was paid anything, let alone that he was paid for participating
22 in the hacking conspiracy, or even that Allaham was; nor does
23 it show that Benomar was paid or agreed to pay anyone. Maybe
24 this excerpt is more meaningful to the plaintiffs than it is to
25 me, but I can only go on the evidence provided. And what is

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1 provided shows no more than that Allaham believed, until
2 disabused by his lawyers, that he could somehow, through
3 Benomar, get money that Qatar owed to him. That hardly amounts
4 to evidence of the applicability of the commercial activity
5 exception.

6 Further, in the same excerpts, Allaham says he had no
7 agreement with Benomar. And defendant provided the Court with
8 another excerpt from the same deposition during which Allaham
9 testified that he never discussed the hacking with Benomar.
10 That's defendant's reply Exhibit A at page 47. In sum, the
11 transcript lines plaintiffs provide are, at best, unconvincing
12 and, at worst, out of context and potentially misleading.

13 I understand that plaintiffs are asking for
14 jurisdictional discovery to establish the facts I now find to
15 be unsupported by evidence, but whether to allow such
16 discovery, and if so, to what extent, is committed to my broad
17 discretion. *In re Terrorist Attacks on September 11*, 689 F.
18 Supp. 2d 552, 566 (S.D.N.Y. 2010). Where a plaintiff fails to
19 establish a *prima facie* case that a court has jurisdiction over
20 a defendant, it is within a court's discretion whether to allow
21 jurisdictional discovery. *Togut v. Forever 21*, 285 F. Supp. 3d
22 643, 648 (S.D.N.Y. 2018). And discovery need not be granted to
23 allow plaintiff to engage in an unfounded fishing expedition
24 for jurisdictional facts. *Vista Food v. Champion Food Service*,
25 124 F. Supp. 3d 301, 315 (S.D.N.Y. 2015). It was plaintiffs'

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1 obligation to provide evidence to show the Court that it had
2 jurisdiction. They seem to have taken their best shot, and
3 they have come up short.

4 Denying jurisdictional discovery is especially
5 appropriate here because plaintiffs have already taken
6 substantial discovery in the California action.

7 If the defendant is diplomatically immune, he is also
8 immune from discovery, and the concerns of international comity
9 that animated the VCDR would be undermined if diplomats had to
10 engage in discovery, even where plaintiffs made no showing of
11 subject matter jurisdiction. So, I find that the defendant is
12 entitled to diplomatic immunity and decline to allow
13 jurisdictional discovery.

14 Although I need not address whether the defendant is
15 entitled to derivative sovereign immunity, I'll talk about it
16 for a couple of minutes because I tend to think that he does
17 have the better of the argument.

18 He claims he's entitled to derivative sovereign
19 immunity, also known as Foreign Official Immunity, because, to
20 the extent the plaintiffs' complaint is true, or must be taken
21 as true, he allegedly acted as an agent on behalf of both Qatar
22 and Morocco, both of which are immune under the Foreign
23 Sovereign Immunities Act.

24 Plaintiffs argue that derivative sovereign immunity
25 does not apply because Benomar is sued in his personal

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1 capacity, and therefore, the FSIA, which only applies to
2 foreign sovereigns, doesn't apply to him.

3 The FSIA, 28 U.S. Code Section 1604, provides that a
4 foreign state shall be immune from the jurisdiction of the
5 courts of the United States and other States, except as
6 provided in Sections 1605 to 1607 of this chapter.

7 In *Samantar v. Yousef*, 560 U.S. 305, 320, the Supreme
8 Court clarified that the FSIA governed determinations of
9 sovereign immunity for foreign states, but not for current or
10 former foreign officials. It pointed out, however, at page
11 324, that even if a suit is not governed by the FSIA, it may
12 still be barred by foreign sovereign immunity under common law.
13 The official's immunity is derivative of state immunity but is
14 not coextensive with the law of state immunity. In other
15 words, in some circumstances, the immunity of the foreign state
16 extends to the individual for acts taken in his official
17 capacity. That's *Samantar* at 320, 322.

18 The relevant inquiry focuses on the official's
19 conduct, not his status, and whether the act was performed on
20 behalf of the foreign state and is, thus, attributable to the
21 state. *Moriah v. Bank of China*, 107 F. Supp. 3d 272, 277
22 (S.D.N.Y. 2015).

23 As one court has explained, the common law of foreign
24 sovereign immunity is perhaps uncharacteristically facile and
25 straightforward. If the State Department submits a suggestion

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1 of immunity, then the district court surrenders its
2 jurisdiction. *Tawfik v. al-Sabah*, 2012 WL 3542209, at *2
3 (S.D.N.Y. Aug. 16, 2012). If, however, the State Department
4 declines the request or does not provide a response, the
5 district court has authority to decide for itself whether all
6 the requisites for such immunity exist. *Moriah*, 107 F. Supp.
7 3d at 276. When deciding for itself, a district court inquires
8 whether the ground of immunity is one which it is the
9 established policy of the State Department to recognize.
10 *Samantar* at 312.

11 To my knowledge, the State Department has not filed a
12 suggestion of immunity, so I'm authorized to decide whether
13 such immunity exists by inquiring whether the ground of
14 immunity asserted is one which it is the established policy of
15 the State Department to recognize.

16 But I must first determine the appropriate pleading
17 standards. Although derivative sovereign immunity is based on
18 a foreign sovereign's immunity, it does not make much sense to
19 apply the procedural framework from an FSIA case here because
20 the Supreme Court has made clear that the FSIA does not apply
21 to individual foreign officials. The motion before me is still
22 a challenge to subject matter jurisdiction on Rule 12(b)(1).
23 So, as before, I apply the standard principles that the burden
24 is on plaintiff to prove jurisdiction by a preponderance. I'm
25 not required to presume the truthfulness of the complaint, and

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1 I may examine evidence.

2 Once again, it does not appear to me that plaintiffs
3 have satisfied their burden by a preponderance. No evidence of
4 defendant's status has been provided, but even if I accepted
5 plaintiffs' allegations, plaintiffs would not prevail. They
6 allege that Benomar acted as a Qatari official or agent in
7 hacking and disseminating plaintiffs' e-mails and sensitive
8 information.

9 They allege, on information and belief, that he,
10 quote, "serves as a secret and unregistered agent of a foreign
11 power and has significant responsibility for coordinating
12 Qatari influence operations in the United States," unquote.
13 That's Paragraph 9 of the complaint. They further allege that,
14 in that capacity, he helped mastermind Qatar's strategy to
15 build influence in the U.S., that's Paragraph 30, through the
16 dissemination of stolen materials to the media and other third
17 parties, that's Paragraph 43.

18 Although I'm not required to presume the truthfulness
19 of plaintiffs' complaint, it seems to me unfair to allow
20 plaintiffs to disavow their own allegations. To allow
21 plaintiffs to sue Benomar would be to allow a suit for conduct
22 that plaintiffs' claim was actually committed by the sovereign
23 or that Benomar committed at the sovereign's direction and on
24 the sovereign's behalf.

25 Because plaintiffs' own allegations suggest that he

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1 acted on behalf of a foreign state and that his conduct is
2 attributable to it, if I had to reach the issue, I likely would
3 find that I lack subject matter jurisdiction on grounds of
4 derivative sovereign immunity.

5 Plaintiffs' arguments regarding government contractors
6 I find inapposite because plaintiffs allege not that the
7 defendant is a mere contractor, but that he is a secret and
8 unregistered agent of a foreign power.

9 Finally, I turn to leave to amend or stay. Plaintiffs
10 have asked to amend in light of the issuance of a blue-bordered
11 ID card. They did that in Document 53. Under Rule 15(a)(2),
12 leave to amend should freely be given when justice so requires.
13 It's within the discretion of the district court to grant or
14 deny leave to amend. *McCarthy v. Dun & Bradstreet*, 482 F.3d
15 184, 200. Leave to amend, though liberally granted, may
16 properly be denied for undue delay, bad faith, or dilatory
17 motive on the part of the movant, repeated failure to cure
18 deficiencies by amendments previously allowed, undue prejudice
19 to the opposing party by virtue of allowance of the amendment,
20 futility of amendments, etc. *Ruotolo v. City of New York*, 514
21 F.3d 184, 191.

22 The complaint in this case was filed on July 23, 2018.
23 Plaintiffs filed their opposition to the instant motion on
24 November 14, 2018. Between those two dates, they had every
25 opportunity to gather evidence to show that Benomar was not

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1 entitled to diplomatic immunity. They were aware that he would
2 claim such entitlement at least as of September 28 when his
3 counsel raised it in a pre-motion letter, Document 25; and they
4 likely were aware of that possibility before that.

5 They were aware that Benomar could obtain a
6 blue-bordered identification card; they were aware of the
7 Vienna Convention's exceptions to diplomatic immunity; they
8 intended, at least as of October 4, 2018, to raise the
9 commercial activity exception because they mentioned it in
10 their pre-motion letter, Document 27 at page 2. They were
11 aware, because the Court pointed it out at the October 10, 2018
12 status conference, and, undoubtedly, apart from that, that
13 material outside the complaint would be considered on the
14 defendant's Rule 12(b)(1) motion. And they were, or should
15 have been aware, that they would have to present concrete facts
16 and evidence to overcome diplomatic immunity, or to establish
17 an exception to it.

18 I think what I have before me is plaintiffs' best shot
19 at establishing that Benomar is not entitled to diplomatic
20 immunity. Not only is the blue card not really a surprise to
21 plaintiffs, but plaintiffs stated in Document 47 that they
22 believe that their opposition brief already addressed the
23 issues raised by its issuance.

24 Further, plaintiffs have not suggested that they are
25 in possession of facts that would cure the deficiencies

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1 identified in this ruling. They've presented a proposed
2 amended complaint, which is attached to Document 53, that
3 includes allegations. If those allegations were proven, they
4 could possibly establish the commercial activity exception, but
5 they are just that, allegations. They are not evidence.

6 Even if I allowed plaintiffs to file the amended
7 complaint, a renewed motion would come out the same way because
8 plaintiffs have not claimed to have any evidence not already
9 available to them. So amendment would be futile because the
10 problem here is not a pleading deficiency that plaintiffs can
11 fix. It's an absence of evidence.

12 See *Raj v. Société General*, 2016 WL 354033 - it might
13 be 354133 - at *2 (S.D.N.Y. Jan. 21, 2016), where the court
14 found amendment would be futile if the amended complaint would
15 be subject to dismissal for lack of subject matter
16 jurisdiction, so I decline to permit leave to amend.

17 Finally, plaintiffs invoke the 1956 decision at page 4
18 of their opposition, footnote 3, to argue that I should stay
19 the case while Benomar serves out his diplomatic assignment,
20 but defendant is correct that that case was decided more than a
21 decade before the ratification of the VCDR and the enactment of
22 the Diplomatic Relations Act, which requires courts to dismiss
23 cases brought against diplomats immune under the VCDR. See 22
24 U.S. Code Section 254d. Therefore, the request for the stay is
25 also denied.

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1 Despite the gravity of the allegations made by the
2 plaintiffs in this case, the diplomatic immunity mandated by
3 Section 254d precludes me from considering the merits of
4 plaintiffs' claims, at least while Mr. Benomar is cloaked with
5 immunity as a diplomat.

6 I understand the frustration, particularly because the
7 diplomatic status was not documented until after the alleged
8 conduct, but the purpose of that immunity, quote, "is not to
9 cover up heinous deeds from coming to the light of day, or to
10 protect a nation's leaders from accountability for their acts,"
11 unquote, *Tachonia*, 169 F. Supp. 2d at 317, but, rather, to
12 protect the interests of comity and diplomacy among nations and
13 to ensure the protection of our own diplomats abroad, see
14 *Tabion*, 877 F. Supp. at 292-93.

15 Because Benomar is entitled to immunity under Section
16 254d, I lack subject matter jurisdiction over the claims
17 against him, and the motion to dismiss is granted.

18 If plaintiff wants to sue additional defendants, as he
19 indicated at one point, he should start a new case in whatever
20 court is appropriate.

21 The clerk of court should terminate Document 37.

22 I will do a written order incorporating my ruling so
23 that if anybody wants to appeal, they can do so.

24 I think that takes care of our business.

25 MR. WOLOSKY: Your Honor, may I. Just two points.

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1 First, to make the record clear, and to preserve our
2 rights for appeal, we would like to make an offer of proof that
3 we sought to file the amended complaint that is docketed as
4 ECF 53.

5 Second, we wish to make an offer of proof and provide
6 to the Court the request for production of documents that we
7 would have sought in the context of jurisdictional discovery.

8 May I approach the bench to provide to your Honor the
9 second document, the request for production?

10 MR. LOWELL: I don't see a procedure vehicle for what
11 he wants to do. He has taken his shot in the pleadings that
12 you have now ruled upon, and having been ruled upon, he wants
13 to put something else in the record. It doesn't occur that way
14 when you just come to court saying, By the way, here's what I'd
15 like the record to be.

16 Given that he did not have those documents properly
17 filed at a time and in a vehicle, then what it does is put in
18 the record things that I cannot respond to, that the Court has
19 already ruled against, and basically it has no legal effect for
20 what he might want to do, which is, appeal your decision based
21 on what you have just spent a considerable amount of time
22 explaining.

23 THE COURT: Sounds right to me.

24 Look, the Circuit could tell me I'm wrong, but I don't
25 think they should do it on the basis of information that was

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1 not in front of me.

2 The proposed amended complaint is already in the
3 record, but I'm not going to add anything after I've ruled.

4 MR. DWYER: Your Honor, just one thing.

5 We were going to file these before, and you ordered
6 the parties not to submit any more filings. We think --

7 THE COURT: And I did that for a reason.

8 MR. DWYER: Right. We think it's unfair for us to be
9 denied both the opportunity to do it when Mr. Lowell would
10 concede it was timely, and now because it's now not timely
11 because you wouldn't let us file anything.

12 THE COURT: But you had the opportunity to request --
13 the document we're talking about is the request for
14 jurisdictional discovery. You talked about that in your motion
15 papers.

16 MR. WOLOSKY: No, your Honor --

17 THE COURT: There was nothing stopping you from
18 expanding on that.

19 What I didn't like was the nasty grams that you guys
20 were sending back and forth, and I'd heard enough on leave to
21 amend. The issue of jurisdictional discovery was something
22 raised in the motion papers, and you certainly had the option
23 to say, If we were allowed jurisdictional discovery, here's
24 what we would have asked for. So, when I said stop sending me
25 letters, that was about amending -- it didn't seem to have

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1 anything to do with jurisdictional discovery.

2 MR. DWYER: With deference, you said, Stop sending me
3 letters. You didn't say, Stop sending me nasty grams. Not
4 sending you --

5 THE COURT: Nasty gram is my shorthand for letters
6 where the lawyers are taking shots at each other, and I've
7 heard enough on the subject.

8 The subject was the amendment. The issue of
9 jurisdictional discovery, I don't even think was mentioned in
10 those letters, but as I said a moment ago, the opportunity to
11 elaborate on what jurisdictional discovery you wanted or might
12 be helpful, was when you opposed the motion. So I'm not going
13 to accept anything else into the record after I've ruled.

14 If the Circuit says that I should have been
15 clairvoyant enough to know that you wanted to say something
16 about what jurisdictional discovery you would seek and that
17 when I said enough with the nasty grams, I shouldn't have done
18 that because I should have somehow known that you might have
19 had something else you wanted to put in on jurisdictional
20 discovery, they'll tell me.

21 MR. WOLOSKY: Different subject, your Honor. This
22 goes to the evidence that we do have.

23 THE COURT: I don't want to hear it. Whatever
24 evidence is in the record, I looked at.

25 You know, one can't --

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1 MR. WOLOSKY: Your Honor --

2 THE COURT: I've ruled.

3 MR. WOLOSKY: I understand. It goes to the evidence
4 that's not in the record and the reason why --

5 THE COURT: That's all the more reason why it
6 shouldn't come into the record. I've looked at what's in the
7 record, and whatever -- if there's more, it's not something I
8 can consider. I've ruled.

9 MR. WOLOSKY: I understand.

10 THE COURT: And I'm not going to --

11 MR. WOLOSKY: May I just offer two sentences or three
12 sentences on this, your Honor.

13 Your Honor, at the last hearing, there was an extended
14 colloquy with Mr. Dwyer about our efforts to submit materials
15 to you that had been taken in discovery in the California case,
16 including discovery of the individuals that we allege were
17 Mr. Benomar's business partners and co-conspirators.

18 We had an extended discussion about why we couldn't
19 submit those on the public record and why we needed to file
20 them, if at all, under seal, because they were protected. They
21 were designated in the California case. That discussion ended
22 with Mr. Lowell saying that he didn't want to receive any
23 documents.

24 What we would like to submit to you, your Honor, is
25 that just because Mr. Lowell does not want to receive the

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1 documents, which are dispositive -- the documents that we have,
2 which are accessible from Mr. Benomar's files, are dispositive
3 of the commercial relationship. We would like to submit that
4 to your Honor for in-camera review in connection with our
5 forthcoming motion for reconsideration. It is one document,
6 one document.

7 THE COURT: Let me tell you something. You know as
8 well as I do that you cannot submit new material on a motion
9 for reconsideration, so save your client's money if that's what
10 you're planning to do. You know what a motion for
11 reconsideration is. A motion for reconsideration is for
12 something that was before me that I overlooked.

13 I don't remember the ins and outs of the conversation
14 we had last time except that it sounded like I was being asked
15 to mess with the protective order issued by another judge, and
16 I was not inclined to do that. And that was the last I heard
17 of it. So, I cannot help you with that subject. But really,
18 if your basis for a motion for reconsideration is going to be
19 that you had more evidence that you could have put in, that is
20 not a basis for reconsideration, and it, frankly, would be
21 frivolous.

22 If there's something that you would put in a motion
23 for reconsideration, I don't know why it wasn't put in your
24 opposition.

25 Thank you, all. Have a nice break. I hope you'll all

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1 get one.

2 MR. LOWELL: Thank you, Judge.

3 MR. WOLOSKY: Thank you, your Honor.

4 (Adjourned)

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